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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/511,388

10/15/2004

Arjen Bot

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02/19/2008

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EXAMINER

PADEN, CAROLYN A

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

02/19/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/511,388	Applicant(s) BOT ET AL.	
	Examiner Carolyn A. Paden	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 15 May 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|----------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>4-18-07</u> . | 6) <input type="checkbox"/> Other: _____ |

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3 and 5-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reckweg (WO 97/08956).

Reckweg discloses a vegetable and dairy fat based spread. At page 2, lines 2-6, the spread is described as a water continuous spread containing less than 40% fat, of which 10-55% is a non-dairy fat and 4.5% milk protein. Biopolymers are described at page 8, lines 1-9 to be structuring agents that are used at a level of 0.5%. The pH of the spread is between 4.6 and 5.2. The examples show the preparation process of the claims. It is noted that a consecutive mixing order is not required in the claims. Claim 6 appears to differ from Reckweg in the recitation of a phase volume of the biopolymer phase. Given the fact that the biopolymer phase is an aqueous phase and the emulsion is a water continuous emulsion, one of ordinary skill in the art would expect the phase volume of Reckweg to fall within the range of the claims. No unobvious or unexpected difference is seen between the viscosity in Reckweg and the viscosity of the claims. It is

appreciated that Reckweg is a spread but preamble limitations do not alone carry any patentable weight.

Claims 1-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gupta (EP 0864255).

Gupta discloses a water continuous spread containing less than 10% fat (Title and paragraph [0035]). Low methoxyl pectin is included at a level of 0.5-1% as a polymer (paragraph 0039). Milk protein is included at 3.5-6.5% (paragraph 0042). The pH of the aqueous phase of the spread is at pH 5.4 (paragraph 0048). The spread is made by separately preparing the aqueous and fat phases, mixing the two phases, homogenizing the emulsion, pasteurizing the emulsion and packing it. The temperature of mixing, set forth in paragraphs 0049 to 0050 appears to fall within the range of the claims. No unobvious result is seen from the homogenization conditions of Gupta, when compared to the claims. The claims appear to differ from Gupta in the recitation of the phase volume of the biopolymer phase. Given the fact that the biopolymer phase is the aqueous phase and the emulsion is a water continuous emulsion, one of ordinary skill in the art would expect the phase volume of Gupta to fall within the range of the claims. No unobvious or unexpected difference is seen between the

composition in Gupta and the composition of the claims. No unobvious or unexpected result is seen from the viscosity of the cream that is set forth in claim 8.

Claims 6-8 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 10/496,269. Although the conflicting claims are not identical, they are not patentably distinct from each other because it is not seen that the composition of the prior application is patentably distinct from the claims of the present application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite

by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claims 2, 3 and 7 recites the broad recitation of the melting point of the fat and the product volume, and the claim also recites the preferable range, which is the narrower statement of the range/limitation.

Claims 1-3 and 6-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Campbell (0540085).

Campbell discloses spoonable, soured non-dairy cream that is water continuous and contains 15-60% fat (abstract). The fat sources are shown at page 2, lines 51-54 to be non-dairy fats. In this case milk powder has a dual role as a protein and as a biopolymer. The extent of milk powder in the composition is shown in example 4. At page 3, lines 15-26, the process is disclosed. The claims, as written, appear to set forth the same process steps as Campbell. There is no requirement in claim 1 that step D and step A could not be performed at the same time.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached by dialing 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794

Application/Control Number: 10/511,388
Art Unit: 1794

Page 7

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